

**Ontario Energy
Board**
P.O. Box 2319
27th. Floor
2300 Yonge Street
Toronto ON M4P 1E4
Telephone: 416- 481-1967
Facsimile: 416- 440-7656
Toll free: 1-888-632-6273

**Commission de l'énergie
de l'Ontario**
C.P. 2319
27e étage
2300, rue Yonge
Toronto ON M4P 1E4
Téléphone; 416- 481-1967
Télécopieur: 416- 440-7656
Numéro sans frais: 1-888-632-6273



BY EMAIL

January 28, 2011

Board Secretary
Ontario Energy Board
2300 Yonge Street, Ste. 2700
Toronto ON M4P 1E4

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: Board staff Submission in EB-2010-0295 – LPP Generic Proceeding

Dear Ms. Walli:

Please find attached Board staff submission in the above matter. Please forward the following to all parties in the proceeding. .

Yours truly,

Original Signed by

Rudra Mukherji
Case Manager



IN THE MATTER OF a proceeding initiated by the Ontario Energy Board to determine whether the costs and damages incurred by electricity distributors as a result of the April 21, 2010 Minutes of Settlement in the late payment penalty class action, as further described herein, are recoverable from electricity distribution ratepayers, and if so, the form and timing of such recovery.

BOARD STAFF SUBMISSION

EB-2010-0295

JANUARY 28, 2011

Background to Late Payment Penalty Class Actions

In 1981, the Federal Parliament amended the Criminal Code (section 347) to render it a criminal offence to receive an interest payment at an effective rate of interest exceeding an annual amount of 60%.

In 1994, class actions were commenced against Consumers' Gas Company Limited (now Enbridge Gas Distribution Inc.) (the "*Garland Action*"), and against Toronto Hydro Electric Commission (now Toronto Hydro Electric System Limited) (the "*Pichette Action*") alleging violation of the *Criminal Code* interest provision. These utilities were charging a late payment penalties ("LPP") of 5% on the outstanding bill. Both actions alleged that the LPP was an interest as defined in section 347 of the *Criminal Code*, and that, depending on the amount of the bill and the payment date, the LPP could result in an effective interest in excess of 60%. The plaintiff in each case claimed restitution on behalf of a plaintiff class.

The *Pichette Action* was held in abeyance, while the *Garland Action* was prosecuted.

In the *Garland Action*, the Supreme Court of Canada in 1998 held that the LPP resulted in the charging of an effective rate of interest in excess of 60% and thus contravened section 347 of the *Criminal Code*. In the matter of restitution, in a second decision the Supreme Court of Canada held that none of the defenses prevented restitution of LPPs collected by Consumers' Gas after the commencement of the action against Consumers' Gas.

In 1998, a new class action was started against Toronto Hydro Electric System Limited for restitution of LPPs (the "*Griffiths Action*"). In this action Toronto Hydro Electric System Limited was named as the proposed representative defendant on behalf of all municipal electric utilities (MEUs) in Ontario which have charged LPP on overdue bills. Like the *Pichette Action*, the *Griffiths Action* was held in abeyance.

Similar actions were commenced against Union Gas Limited in 2003.

After the Supreme Court of Canada rulings in the *Garland Action*, only the issue of damage remained unresolved. Instead of going to trial on the damages issue, the parties were successful in reaching a settlement. The Enbridge settlement was

approved by the Ontario Superior Court of Justice and therefore brought an end to the *Garland Action*. Following the Enbridge settlement, Union Gas Limited also settled.

After having concluded the class actions against the natural gas utilities, plaintiff's counsel turned their attention to the action against the electric utilities (the *Pichette Action* and the *Griffiths Action*). The electric utilities similar to the natural gas utilities were successful in reaching a settlement. The total settlement cost including the defendant's legal fees and other costs was \$18,382,125. This settlement was approved by the Ontario Superior Court of Justice in the Minutes of the Settlement dated April 21, 2010.¹ The purpose of this proceeding is to determine whether the total settlement costs against can be recovered from electricity ratepayers, and if so, the form of such a recovery.

By Notice of Proceeding ("Notice") dated October 20, 2010, the Ontario Energy Board (the "Board" or "OEB") commenced a generic hearing on its own motion to determine whether:

1. As a threshold question, whether Affected Electricity Distributors² should be allowed to recover from ratepayers the costs and damages incurred in the LPP Class Action; and
2. If the answer to the first issue is yes, what would be an appropriate methodology to:
 - (a) apportion costs across customer rate classes, and
 - (b) recover such allocated costs in rates.

Pursuant to the Notice, the Board received the collective evidence of the Affected Electricity Distributors on November 8, 2010. This evidence was prepared and filed by the Electricity Distributors Association ("EDA") on behalf of Affected Electricity Distributors. On December 17, 2010 the EDA updated Appendix A to its evidence.

On November 12, 2010, Toronto Hydro Electric System Limited ("THESL") filed limited supplementary evidence that dealt with the second issue, i.e. the issue of the method of recovery. THESL noted that it continues to rely on the collective evidence of the Affected Electricity Distributors and does not challenge or rebut that evidence.

¹ As amended by addenda dated July 7, 2010 and July 8, 2010.

² For purposes of this proceeding, "Affected Electricity Distributors" means licensed Ontario electricity distributors that are named as defendant class members in Schedule F of the Minutes of Settlement, dated April 21, 2010.

Therefore, references to “Affected Electricity Distributors” in relation to the threshold question in this submission include THESL. With respect to the second issue, references to “Affected Electricity Distributors”, exclude THESL.

The total as-filed cost arising from the settlement of the LPP class actions that the Affected Electricity Distributors was seeking to recover from ratepayers is \$18,382,125. This amount includes the estimated settlement payment of \$17 million (actual settlement payment pursuant to the Implementation Order is \$17,037,500), \$700,000 in legal costs, \$632,125 in taxes and \$50,000 due in publication costs related to various court orders and notices.³ Subsequent to the Board’s Notice in this matter, Hydro One Networks Inc., Orillia Power Distribution and Hydro One Remote Communities received Board approval to withdraw from the proceeding. Reflecting this change, and adjusting for amounts already recovered by THESL, the EDA provided the “Updated Recovery Amount” of \$17,690,907.53.⁴

Board staff’s submissions follow the Board approved issues list.

Submission

Whether Affected Electricity Distributors should be allowed to recover from ratepayers the costs and damages incurred in the LPP Class Action?

With respect to the threshold question, the Affected Electricity Distributors submit that the costs arising from the LPP class action are reasonable and prudent and should therefore be recovered from ratepayers.

For the reasons stated in the EDA’s evidence and which are summarized below, Board staff does not oppose the request by Affected Electricity Distributors to recover the costs arising from the LPP class action, from electricity ratepayers.

- The offending LPPs were incurred pursuant to regulatory requirements imposed by regulators. In fact even after the class actions were commenced, regulators continued to approve the LPP mechanism in its original form. The 1989 Ontario

³ Board staff interrogatory no. 2

⁴ Board staff interrogatory no. 1

Hydro guidelines to MEUs, which established the rates that could be charged to customers, stated:

“Late Payment Charge – This charge shall be adopted by all utilities to ensure uniformity in the approach to late payment. A one time charge – 5% of outstanding amount”.⁵

It would be an offence had the MEUs not charged the LPP as ordered by the regulators.

- The Affected Electricity Distributors did not profit from the LPP revenues. LPP revenues were used as revenue offsets to reduce the base distribution revenue requirement that is recovered from all customers.
- As stated in paragraph 33 to 47 of the EDA’s evidence, the Settlement involved extensive bargaining and was approved by the Ontario Superior Court of Justice. Further, the Settlement resulted in the avoidance of future legal costs had the matter proceeded to trial. The costs on per customer basis is also modest.
- Further the Minutes of Settlement acknowledge that the defendant class members will be making an application to the Board to recover the costs of the settlement through rates. Paragraph 10 of the Minutes of Settlement states:

“The plaintiffs acknowledge that the defendant class members will be making an application to the Ontario Energy Board to recover the costs of the settlement through rates. Plaintiff, Pichette and Griffiths, agree in their personal capacities, not to oppose, or appeal to Cabinet, any rate orders sought by the defendant class members from Ontario Energy Board with regards to amounts paid under this settlement or otherwise in connection this litigation.

- The Board has previously allowed the natural gas utilities to recover costs arising from the LPP class action from their ratepayers. In Board staff’s submission, the principles established in the Enbridge case also apply in this case. In EB-2007-0731, the Board determined that all costs, including Enbridge Gas Distribution Inc.’s legal costs, settlement costs and interest recorded in the Class Action Suit Deferral Account were recoverable from ratepayers. In reaching its decision, the

⁵ 1989 Regulatory Guidelines For Ontario Municipal Electric Utilities”, issued in 1997 by Ontario Hydro

Board concluded that the costs were incurred as a direct consequence of Board orders, that the LPPs were to the benefit of ratepayers and that the costs were prudently incurred. In EB-2010-0039, the Board approved a similar request from Union Gas Limited.

What is the appropriate methodology to: (a) apportion costs across customer rate classes, and (b) recover such allocated costs in rates?

The Affected Electricity Distributors propose to recover the subject costs through a monthly fixed charge rate rider over 12 months from all metered customers, as per the Board's most recent Yearbook of Electricity Distributors (the "Yearbook"). For each Affected Electricity Distributor, the monthly fixed charge rate rider would be calculated by dividing the recovery amount by the number of metered customers reported in the Yearbook. This amounts to an allocation based on the number of metered customer per rate class. The Affected Electricity Distributors also requested a variance account to record the difference between each distributor's portion of the recovery amount and the amount recovered from metered customers. Any residual balance in the variance account would be subject to future disposition.

As noted earlier, THESL filed supplementary evidence in relation to the issue of cost recovery. Similar to the EDA's proposal, THESL proposed to recover the subject costs from all metered customers over a 12-month⁶ period through a monthly fixed charge. However, THESL's cost allocation methodology varies from the approach proposed by the EDA's.

THESL proposes to recover the subject costs using a separate rate rider for each metered rate class. THESL proposes to allocate the recovery amount to the metered rate classes based on a 3-year average (2007-2009) of late payment penalties collected from the respective rate classes. The per customer charge is then calculated for each rate class by dividing the allocated recovery amount by the number of customers in that rate class.

Board staff notes that THESL's approach uses the historical rate class contribution to the LPP revenue over the 2007-2009 period as a proxy for the allocation of the recovery

⁶ In Argument-in-Chief THESL submitted that a 24-month recovery is also acceptable.

amount. Board staff submits that this is a better approach than the one proposed by the EDA. The EDA however submitted that the Affected Electricity Distributors are unable to perform an allocation similar to THESLs, noting that historical proportions of LPP revenues were not available across all distributors and even if it were, the data may not be reliable. Given these practical limitations, Board staff submits that the Board may wish to consider adopting two separate approaches – one for THESL and the EDA's approach for the remaining Affected Electricity Distributors.

Both THESL and the EDA propose to recover the allocated costs from all metered customers. They submit that that LPP revenues from unmetered customer classes were nil or negligible, and customer counts in these classes are also small or negligible in proportion to total number of customers. Both THESL and the EDA provided evidence that confirmed the above. Therefore, Board staff submits that the approach proposed by the EDA and THESL in relation to metered customers is reasonable.

As an alternative to the fixed charge rate rider, THESL also proposed a volumetric rate rider. THESL submitted that a volumetric rate rider would represent a simpler alternative as it would be consistent with other rate riders that may be approved in its current rate case. However, THESL noted that it is able to implement either type of rider (fixed or variable). Board staff submits that the approach to recover the subject costs should be consistent across Affected Distributors, as it will mitigate customer confusion. Further Board staff submits that a recovery through a fixed charge is more appropriate as it is consistent with the Board's Decision in the case of Enbridge and Union Gas.

All of which is respectfully submitted